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No. 99-1406

In the Supreme Court of the United States

JOYTIME DISTRIBUTORS AND AMUSEMENT CO., INC.,
PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF SOUTH CAROLINA
SUPREME COURT

BRIEF FOR THE STATE OF SOUTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the issues raised by the Petition were raised or addressed below?

II. Whether the decision below involves only matters of State law?

III. Whether the decision below infringed First Amendment freedoms when it found statutory provisions for a referendum as to video gaming to be unconstitutional and found bans on payouts on video game machines in that statute to be severable from the provisions for the referendum?

IV. Whether provisions for a republican form of government require the use of a referendum and whether this issue is justiciable?

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Act No. 125, 1999 S.C. Acts 1319 . . . . . 1, *passim*

JURISDICTION

The State acknowledges that Joytime seeks review as set forth in its statement of jurisdiction, but the State denies that the Court has jurisdiction in this matter because the issues raised by the Petition were neither raised nor addressed below.

STATEMENT OF THE CASE

This Petition challenges the State law decision of the South Carolina Supreme Court in *Joytime Distributors and Amusement Co., Inc. v. The State of South Carolina, Op. No. 25007 (S.C. Sup. Ct., October 14, 1999), 1999 WL 969280.* Appendix (App.) 1. That decision addressed video gaming legislation passed last year by the South Carolina General Assembly. Act No. 125, 1999 S.C. Acts 1319 (App. 23). Part I of that law prohibits cash payouts on video gaming devices effective July 1, 2000. App. 27. Part II provided for a referendum be held ". . . to ascertain whether or not video game machine payouts will continue to be allowed . . . ." App. 33. Part V included a strongly worded severability clause which provided, in part, that a holding that one part of the Act was unconstitutional ". . . shall not affect the constitutionality or validity of the remaining portions of this act . . . ." App. 129.

Joytime initiated this action alleging that the referendum provisions in Part II of Act 125 were an unconstitutional delegation of legislative power to the voters. App. 2 and 3. Pursuant to a Petition by the Attorney General of South Carolina, the South Carolina Supreme

Court agreed to hear the matter in its original jurisdiction. App. 3.

The South Carolina Supreme Court held that the provisions for the referendum ". . .were an unconstitutional attempt to delegate to the people the legislature's power to set the policy of the state and enact laws to effectuate that policy." App. 14 [footnote omitted]. The Court enjoined the holding of the referendum under Part II, but it found that the ban on video gaming payouts in Part I of the law was severable from the unconstitutional portions of the Act. App. 17. Joytime subsequently filed a Petition for Rehearing which was denied by the Court on October 20, 1999. App. 22.

The State respectfully craves reference to the South Carolina Supreme Court's Opinion for a more detailed description of Act 125 and the history of this proceeding (App. 2 & 3) as well as for the decision of that Court as to the merits.

SUMMARY OF ARGUMENT

Joytime has raised for the first time in this Petition Federal constitutional issues under art. IV § 4 and the First Amendment concerning a decision of the South Carolina Supreme Court which never addressed those issues. *Joytime, supra.* As noted in the Statement, that case held that South Carolina statutory provisions for a referendum as to video gaming constituted an unconstitutional delegation of the General Assembly's power to enact the general law of this State and that a ban on video gaming payouts contained in that law was severable. Because Joytime never raised the above Federal issues in the South Carolina Supreme Court and because that Court did not address those questions, they are not subject to review on certiorari. Moreover, no case has ever held that the First Amendment or art. IV § 4 require that States provide referenda procedure for their citizens, and art IV § 4 questions are non-justiciable. Instead, the decision below involved only state law issues as to the constitutionality of the referendum and the severability of the ban on video gaming payouts.

ARGUMENT

I. The Issues Raised by the Petition Were Neither Raised Nor Addressed Below

This Court quoted the following standard of review as follows in *Adams v. Robertson, 520 U.S. 83, 86 (1997)*:

> With "very rare exceptions," *Yee v. Escondido, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L. Ed.2d 153 (1992)*, we

> have adhered to the rule in reviewing state court judgments under §28 U.S.C. 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review....When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. . . .

Joytime challenges, in this Petition, the South Carolina Supreme Court's decision that the video gaming referendum was unconstitutional even though Joytime, itself, had asserted in that Court that the referendum was an unconstitutional delegation of legislative power to the voters. *Joytime v. State, supra*; App. 2, and, Act No. 125, Part II § 9, 1999 S.C. Acts 1319. The State defended the referendum as being consistent with the State Constitution. Neither the State nor Joytime ever raised the Federal issues set forth in the instant Petition of whether the enjoining of the referendum violates provisions for a republican form of government or First Amendment freedom . U.S. Const. art. IV § 4 and Amend. I. The South Carolina Supreme Court did not address these provisions in its opinion. Accordingly, because the issues set forth in the Petition herein were neither raised before nor addressed by the South Carolina Supreme Court, these issues are not subject to review now by this Court.

II. The Decision Below Involves Only Matters of State Law

The South Carolina Supreme Court's opinion addresses matters that are entirely State law concerns. The Court found legislation providing for a referendum related to video gaming to be contrary to State law by delegating to the people the legislature's power to set the policy of the State and enact laws to effectuate that policy. App. 14. The Court found the unconstitutional parts of the law to be severable from the constitutional parts of the law under the terms of a strong severability clause in that statute. App. 18. Joytime raises no significant or meritorious federal issue about these matters as to which this Court should grant certiorari. *See infra, Arguments III and IV.*

III. The Decision Below Did Not Infringe First Amendment Freedoms

Joytime cites no applicable support for its vague argument that the South Carolina Supreme Court "infringed fundamental First Amendment Freedoms of the South Carolina Electorate by First Enjoining the Referendum on Video Gaming and then itself deciding that such gaming should be outlawed." Pet. 7. It has cited not a single case that holds that the First Amendment entitles voters to a referendum or similar procedure. *See also, infra, Argument IV.*

Those cases that Joytime does cite as to referenda merely address separate speech related activities rather than

whether a referendum or initiative is compelled by the First Amendment. *Meyer v. Grant, 486 U.S. 414 (1988)* struck down restrictions on the use of paid petition circulators under a Colorado initiative process. In doing so it made clear that it was addressing the infringement on speech in these restrictions rather than any purported right to have an initiative process. As the Court stated:

> The decision in *Posadas [de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)]*does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." *828 F.2d, at 1456.* Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.

486 U.S. at 424. Similarly, *Buckley v. American Constitutional Law Foundation, Inc.*, __U.S.___, 119 S.Ct. 636 (1999) struck down requirements that petition circulators be registered voters and wear name badges. In a different context, *Thomas v. Collins, 323 U.S. 516, 545 (1945)*, addressed registration requirements as applied to a labor union speaker.

None of these cases support Joytime's argument. The instant case involves only questions of State law as to which the First Amendment has no application.

IV. Provisions for a Republican Form of Government Do Not Require the Use of a Referendum and the Issue of Whether a Government is Republican is a Matter for Congress to Determine Rather than the Courts

Joytime cites absolutely no authority that state referenda are rights encompassed by U.S. Const. art. IV § 4 provisions for a republican form of government. Certainly, the framers of the United States Constitution could not have had any such intention to require that States provide for referenda when they did not provide for referenda on the Federal level. South Carolina's Constitution provides for no referenda procedure except under limited circumstances such as constitutional amendments and bonded indebtedness not applicable to the instant natter. *See* App. 8 and 9.

Moreover, the issue of whether a government is republican is a matter for Congress to determine rather than the Courts. *Pacific States Tel. & T. Co. v. Oregon, 223 U.S. 118 (1912).* In *Pacific States,* at issue was whether, contrary to the argument in the instant case, Oregon provisions for initiatives and referenda violate art. IV § 4. The Supreme Court found the question to be a non- justiciable political question for Congress. As stated in *Baker v. Carr, 369 U.S. 186, 223 (1962)*:

> ...the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause--which alone had been

> invoked for the purpose--as the source of a constitutional standard for invalidating state action.[1]

The cases cited by Joytime provide no support for its position and do not address art. IV § 4. In *City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 673 (1976)*, the Ohio Constitution specifically reserved the power of referendum to the people of each municipality within the State. The Court stated as follows:

> Since the rezoning decision in this case was properly reserved to the People of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid, on federal constitutional grounds [due process], the charter amendment permitting the voters

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[1] In *New York v. United States, 505 U.S. 144, 184 (1992)*, the Court stated that "[i]n most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." The Court noted that " [i]n a group of cases decided before the holding of *Luther* [*v. Borden, 7 How. 1, 12 L.Ed. 581 (1849)*] was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." *Id.* Among those cases was one that addressed a State law under art IV § 4. *Attorney General of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905)*. As noted by the Court in *New York*, *Lowrey* was decided prior to the "rule of nonjusticiability," and it was decided prior to *Pacific States, supra.* which specifically found state referendum questions to be non-justiciable. At issue in *New York* was a Federal rather than State law, and the Court found that it did not need to decide then suggestions as to whether all Guaranty Clause claims are non-justiciable. *Id.*

> to decide whether the zoned use of respondent's property could be altered.

426 U.S. at 679. *Eastlake* is distinguishable because it addressed a specific reservation of powers to hold referenda which do not exist in South Carolina's Constitution.

The South Dakota case cited by Joytime is a State law case inapplicable to this matter. *Wyatt v. Kundert, 375 N.W. 2d 186 (S.D. 1985).* *Wyatt* addressed a constitutional provision that reserved the right of initiative to the citizens, and noted that South Dakota had recognized an inherent right to do so prior to the adoption of the constitutional provision. South Carolina has recognized no right of direct legislation by referendum under its constitution and none is required by art. IV § 4. *Joytime, supra*, App. 8.

CONCLUSION

The Court should deny this Petition.

Respectfully submitted,

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